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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA – SOUTHERN DIVISION

AFROUZ NIKMANESH, ELVIS ATENCIO, ANNA NGUYEN, AND EFFIE SPENTZOS, on behalf of themselves, the general public, and all others similarly situated,

Plaintiffs,

vs.

WAL-MART STORES, INC., a Delaware corporation, and WAL-MART ASSOCIATES, INC., a Delaware corporation, and DOES 1 through 10, inclusive,

Defendants.

Case No. 8:15-CV-00202-AG-JCG

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23

DATE:	November 28, 2016
TIME:	10:00 a.m.
COURTROOM:	10D
JUDGE:	Hon. Andrew J. Guilford

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I. INTRODUCTION

Plaintiffs seek to certify a proposed class of more than 1,300 hourly Pharmacy Managers and Staff Pharmacists who worked at approximately 300 Walmart locations in California since 2010, asserting that they did not always take rest breaks. Plaintiffs' theory is that—although Walmart has a valid rest-break policy that authorizes and permits pharmacists to take rest breaks in compliance with California law—other Company policies and certain performance goals (including a pharmacy security policy and certain performance goals) that allegedly make it challenging for pharmacists to take rest breaks when they are the only pharmacist on duty. Plaintiffs argue that these other procedures constitute a "policy to violate the policy," which they say provides a basis for class certification under *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161 (9th Cir. 2014).

But Plaintiffs ignore that the Ninth Circuit's *Jimenez* decision involved an off-the-clock claim where the defendant had an informal management policy that required overtime work, while at the same time penalizing overtime reporting. *Id.* at 1165. In other words, *Jimenez* involved an actual "policy to violate the [overtime] policy," which the Ninth Circuit held created common issues suitable for certification. *Id.* at 1166 n.5. Here, in contrast, Plaintiffs have no evidence of a common policy *to deny or prevent pharmacists from taking the rest breaks* permitted by the rest-break policy. Instead, they point to a security policy and performance goals (which on their face have nothing to do with rest breaks) and argue that the practical effect of these procedures sometimes made it hard for pharmacists to take rest breaks. As other courts have recognized, this type of "practical effects" theory is not proper for class certification because determining whether these unrelated procedures actually prevented or discouraged an individual pharmacist from taking a rest break would involve numerous individualized inquiries.[1]

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[1] *See Roth v. CHA Hollywood Med. Ctr., L.P.*, No. 2:12-cv-07559-ODW(SHx), 2013 U.S. Dist. LEXIS 153856, at *17-18 (C.D. Cal. Oct. 25, 2013) ("Neither has Ekin established any uniform policy or practice that rendered each putative class member too busy or unable to take statutorily mandated rest or meal breaks."); *Hadjavi v. CVS Pharmacy, Inc.*, No. CV 10-04886 SJO (RCx), 2011 U.S. Dist. LEXIS 86341, at *10

Notably, the district court in *Jimenez* declined to certify a rest break claim for a similar reason.[2]

The evidence underscores that that Plaintiffs' rest break theory should not be certified. Again, Plaintiffs acknowledge that Walmart's rest break policy complies with California law, and the evidence establishes that pharmacists were aware of this policy and actually took rest breaks, including when they were the only pharmacist on duty. The evidence shows that pharmacy staffing varies by day, customer needs and location. The evidence also shows that the time it takes to secure a pharmacy varies by location, pharmacist and circumstance, and that many pharmacists were able to comply with Walmart's security policy and work toward their performance goals, while also taking rest breaks. As Plaintiffs' witnesses have testified, any decisions to forego breaks were based on the pharmacists' individual preferences, which cannot form the basis of a rest-break claim, let alone on a class basis. *See Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1031 (2012) ("[E]mployees cannot manipulate the flexibility granted them by employers to use their breaks as they see fit to generate such liability.").

Determining if Walmart is liable to even a single pharmacist would require, among other things:

- A day-by-day inquiry as to whether the pharmacist, in fact, took a break and whether Wal-Mart was aware of that fact;[3]

(C.D. Cal. July 25, 2011) ("Plaintiffs have failed to demonstrate that Defendants had a uniform or common policy in place that 'prevented' employees from taking meal and rest breaks and did not provide overtime wages throughout all California locations.").

[2] *See Jimenez v. Allstate Ins. Co.*, No. LA CV10-08486 JAK (FFMx), 2012 U.S. Dist. LEXIS 65328, at *48 (C.D. Cal. Apr. 18, 2012) ("[T]he success of Plaintiff's claims will depend on individualized questions, such as whether a particular adjuster took the legally mandated breaks, and if breaks were missed, why the adjuster failed to take them."); *see also Kilbourne v. Coca-Cola Co.*, No. 14cv984-MMA (BGS), 2015 U.S. Dist. LEXIS 118756, at *35 (S.D. Cal. July 29, 2015) (noting that *Jimenez* denied certification of rest break claims and discussing significance).

[3] Notably, rest breaks are not recorded, nor does California law require them to be recorded. (Herrington Decl. Ex. 1); IWC Wage Order 7-2001, § 7(a)(3); *In re Autozone,*

- If a pharmacist did not take a break, whether he/she voluntarily chose not to take a break or believed he/she was unable to take a break;
- If a pharmacist believed he/she was unable to take a break, why he/she held that belief and whether that belief was objectively reasonable.

Each of these inquiries is individualized. Accordingly, there are no common answers to any common questions, and individualized issues predominate, such that class treatment is inappropriate and unmanageable. *See Cole v. CRST, Inc.*, No. EDCV 08-1570-VAP (SPx), 2016 U.S. Dist. LEXIS 48940, at *10 (C.D. Cal. Apr. 1, 2016) ("As Plaintiff cannot show that Defendant had a policy of preventing drivers from taking meal and rest breaks, and because there is evidence in the record of drivers taking meal and rest breaks without interference from Defendant, individualized inquiries predominate.")

Significantly, Plaintiffs have offered no common evidence to establish even the most basic component of their rest break claim, namely when pharmacists missed rest breaks and whether any missed break was caused by Walmart. Plaintiffs' expert, Dr. Cohen,[4] asserts that he may be able to provide this evidence at some point in the future after he analyzes data Plaintiffs' counsel has had for months and conducts a survey. But the expert disclosure deadline is November 7, and it was Plaintiffs' burden to present any such evidence *with* their motion, not just theorize about the possibility.

Class certification also should be denied because the named Plaintiffs are neither typical nor adequate. All of the named Plaintiffs (and some putative class members) were—at least at times—Pharmacy Managers. In that role, they were responsible for ensuring compliance with company policies, including the rest-break policy; staffing and scheduling their respective pharmacies, including the scheduling of their own hours and

---

Inc., No. 3:10-md-02159-CRB, 2016 U.S. Dist. LEXIS 105746, at *46-50 (N.D. Cal., Aug. 10, 2016) (decertifying rest-break claim where plaintiffs failed to identify common records of allegedly missed breaks).

[4] Walmart has separately filed objections to Dr. Cohen's declaration, which is incomplete and inadmissible under Fed. R. Evid. 702-703.

those of Staff Pharmacists; and addressing human-resources issues with appropriate Walmart personnel. Because of these responsibilities, the named Plaintiffs have a conflict of interest. Some Staff Pharmacists have alleged that their Pharmacy Managers discouraged them from taking breaks by improperly staffing or scheduling their respective pharmacies, asking them to do more work, and/or asking them to improve their prescription fill times or customer-service scores. On the other hand, some of the named Plaintiffs and their fellow Pharmacy Managers have testified that they communicated the rest-break policy to Staff Pharmacists, never told anyone not to take a rest break or discouraged anyone from doing so, and that nobody complained to them about rest breaks. In short, the named Plaintiffs have testified and will continue to testify against the putative class members they seek to represent.

In sum, Plaintiffs have not satisfied their burden under Rule 23. Their "practical effects" theory cannot provide common answers as to rest breaks and the evidence shows that individualized issues predominate and that Plaintiffs are neither typical nor adequate. For these reasons, Walmart respectfully requests that the Court deny certification.

II. STATEMENT OF FACTS

A. Walmart Pharmacies

Walmart operates approximately 300 pharmacies in California at which approximately 1300 pharmacists have worked since December 2010. (Def. Ex. 3, Rodriguez Decl. ¶ 2.) Each pharmacy has a Pharmacy Manager, who typically is also the "Pharmacist in Charge" for purposes of compliance with state pharmacy law. (*Id.*) In addition, most pharmacies utilize Staff Pharmacists (who are often part-time employees) and/or "floater" Staff Pharmacists from other stores, who can fill in when necessary. (*Id.*) All four named Plaintiffs worked as Pharmacy Managers at various times. (Pls.' Exs C-F, Nikmanesh Decl. ¶ 3; Spentzos Decl. ¶ 2; Atencio Decl. ¶ 4; Nguyen Decl. ¶ 3.)

Each Pharmacy Manager reports to a Health & Wellness Market Director. (Def. Ex. 3, Rodriguez Decl. ¶ 3.) At any given time over the past several years, there have been approximately 30 different Market Directors in California, each of whom has overseen approximately 10-12 pharmacies. Each Market Director reports to a Regional Director, who in turn reports to a Divisional Director. Three Regional Directors oversee different parts of California, and one Divisional Director oversees all of California. (*Id.*)

Market Directors and Pharmacy Managers are jointly responsible for hiring pharmacists and ensuring that stores are adequately staffed. (*Id.,* ¶ 4.) Staffing levels—the number of pharmacists available to work at a given store—vary widely across the state and depend on various geographic, demographic, and market conditions, including the demand for pharmacy services in a given area, the number of competing pharmacies, and the number of available pharmacists for hire, if any. (Def. Ex. 26, Bhatt Dep. 55:11-55:21; Def. Ex. 37, J. Chau Dep. 22:16-23:3; Def. Ex. 41, Leiva Dep. 35:24-36:8.)

Pharmacy Managers are also responsible for scheduling—utilizing the pharmacists on staff at their respective stores, along with floater pharmacists. (*See, e.g.*, Def. Ex. 37, J. Chau Dep. 16:18-17:7; Def. Ex. 49, Wong Dep. 17:12-15, 18:21-19:11, 21:2-15.) Like staffing, scheduling varies significantly from store to store, week to week, and day to day. (*See, e.g.*, Def. Ex. 43, Nemenzo Dep. 54:4-18; Def. Ex. 20, Nikmanesh I Dep. 202:4-21; Def. Ex. 50, Yee Dep. 15:2-17:1, 27:7-20.) Some pharmacies are "triple covered," with three pharmacists on duty during certain days or times, while other pharmacies could be "double" or "single" covered. (*See, e.g.*, Def. Ex. 46, Park Dep. 49:5-16; Def. Ex. 20, Nikmanesh I Dep. 202:2-21; Def. Ex. 23, Atencio Dep. 149:24-150:18.) These variations are based on, among other things, the unique circumstances of the individual pharmacists (*e.g.*, availability and preferred hours) and the needs of the individual stores (*e.g.*, the amount of work anticipated at any given time), which themselves vary from day to day and even hour to hour. (*See id.*; *see also, e.g.*, Def. Ex. 49, Wong Dep. 19:6-25; 21:2-22:23; Def. Ex. 21, Nikmanesh II Dep. 175:9-20.)

B. Walmart's Rest-Break Policies

Walmart has multiple written policies (specific to California) expressly provide for rest breaks for hourly associates, including California pharmacists. (*See, e.g.*, Pls.' Ex. 42.) Walmart's policies are more favorable to employees than California law requires:

> Walmart is committed to ensuring each associate receives their rest break, meal period and day of rest appropriately. We provide nonexempt associates in California … with rest breaks, meal periods, and days of rest as described in this policy.
>
> …
>
> Depending on how many hours you work, you will receive paid, uninterrupted **15-minute rest breaks** as follows:
>
> - If you work more than three and up to six hours in a single workday, you will receive one rest break.
> - If you work more than six and up to ten hours in a single workday, you will received two rest breaks.
> - If you work more than ten and up to fourteen hours in a single workday, you will receive three rest breaks.
>
> . . .
>
> **You are authorized and permitted to take a 15-minute paid rest break for every three hours worked.** Whenever practicable, you should take (or will be scheduled for) your breaks near the middle of each three-hour work period.
>
> Walmart will pay you at your regular rate of pay for the time you spend on rest breaks in accordance with this policy. Do not clock out or clock in for rest breaks.

(*Id.* (emphasis added and internal headings omitted).)

And California pharmacists who believe that they have inappropriately been denied a break are responsible for reporting any such incident:

> **If you believe that you have been improperly denied a rest break**, meal period or day of rest; have been improperly asked to work during a rest break, meal period or day of rest; or if you have any other questions or concerns regarding this policy, **you should immediately contact** . . . [y]our

> immediate supervisor; [y]our HR representative or [t]he Global Ethics Office . . . .
>
> **Walmart prohibits retaliation against any associate for reporting a possible deviation from this policy** or for cooperating in an investigation.

(*Id.* (emphasis added and internal headings omitted).)

Plaintiffs' deposition testimony reveals that Walmart pharmacists are aware of these policies and understand that they are authorized and permitted to take rest breaks. (*See, e.g.*, Def. Ex. 22, A. Nguyen Dep. II 25:17-26:7; Def. Ex. 37, J. Chau Dep. 15:16-17:7, 25:14-27:5; *see also* Herrington Decl., Chart.) Contrary to Plaintiffs' assertions, there is no policy encouraging, let alone requiring, pharmacists to take breaks inside pharmacies. Instead, Walmart's written policy is the opposite:

> **You should take your rest breaks in the facility's break/meeting room or in another area of the premises designated for associate rest breaks or meal periods.** In light of the amount of time provided, you are encouraged not to leave Walmart property during your rest breaks. …

Further, the Policy makes clear that:

> **You should be completely relieved of duty and must not perform any work during your rest breaks. If you perform work during a rest break that prevents you from receiving 15 minutes of uninterrupted non-work time, you may take a later paid, uninterrupted 15-minute rest break as soon as practicable.** However, performing work during a rest break may result in a rest break exception.

(Pls.' Ex. 42 (emphasis added and internal headings omitted).)

C. Pharmacist Evaluations

Walmart pharmacists are evaluated annually based on a mix of factors that has varied over time. (*See* Def. Ex. 1, Def. Ex. 25 Rodriguez Dep. 37:9-14; 38:8-39:13.) During the putative class period, pharmacy sales and customer experience were included in the review factors. But the amount of time it takes a pharmacist to fill prescriptions and customer wait times were not. (Def. Ex. 1.)

III. PLAINTIFFS HAVE NOT MET THEIR BURDEN UNDER RULE 23

Under Rule 23, the moving party "must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). "[C]ertification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of [Rule 23] have been satisfied.'" *Id.*at 350-51 (citation omitted).

A. Plaintiffs' Proposed Class Definition is Overbroad.

"A class definition should be precise, objective, and presently ascertainable," though "need not be so ascertainable that every potential member can be identified at the commencement of the action." *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311, 319 (C.D. Cal. 1998) (internal quotations omitted). A proposed class that includes those who have not been harmed is both imprecise and overbroad. *See Mazur v. eBay Inc.*, 257 F.R.D. 563, 567 (N.D. Cal. 2009).

Here, Plaintiffs' proposed class is imprecise and overbroad in at least two ways. Plaintiffs seek to certify various classes of pharmacists who "did not take" a rest break when scheduled to be the only pharmacist on duty "at any time" during the shift. (Pls.' Mem. at 1:8-12.)[5] But Walmart has no liability to a pharmacist who simply "did not take" a rest break. Liability, if any, must be based on a failure to "authorize and permit" a timely rest break. *See Cleveland v. Groceryworks.com, LLC*, No. 14-cv-00231-JCS, 2016 U.S. Dist. LEXIS 103672, at *65 (N.D. Cal. Aug. 4, 2016) (California law requires employers "to authorize and permit" breaks) (citations omitted). Thus, a pharmacist who simply "did not take" a rest break—for example, a pharmacist who chose, for whatever reason, not to take a rest break—would be covered by the proposed class and yet would have no claim. *See Cummings v. Starbucks Corp.*, No. CV 12-06345-MWF (FFMx), 2014 U.S. Dist. LEXIS 51970, at *12 (C.D. Cal. Mar. 24, 2014) ("Each proposed class is overinclusive in that it is not limited to employees who were denied a rest or meal break, in violation of California labor law.")

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[5] Plaintiffs propose four class definitions (rest break, wage statement, waiting time and UCL), but the second, third and fourth are entirely derivative of the proposed rest break class and cannot be certified for the same reasons. Plaintiffs also allege representative claims under the Private Attorneys' General Act of 2004 ("PAGA"), Cal. Labor Code § 2698, *et seq.* which suffer from the same defects. *See, e.g., Raphael v. Tesoro Refining & Mktg. Co. LLC,* No. 2:15-cv-02862-ODW, 2015 WL 5680310, at *2-3 (C.D. Cal. Sept. 25, 2015) (resolution of PAGA claim would require the court to "engage in a multitude of individualized inquires making the PAGA action unmanageable and inappropriate"); *Amey v. Cinemark USA Inc.*, No. 13-CV-05669-WHO, 2015 WL 2251504, at *16 (N.D. Cal. May 13, 2015) (disallowing PAGA claims where the evidence shows "that numerous individualized determinations would be necessary").

The phrase "at any time" creates further imprecision and over breadth. Plaintiffs' theory is that single-staffed pharmacists had a hard time taking rest breaks, but this could be an issue only if a pharmacist was single-staffed and had no coverage for the entirety of a block of time during which there would be a right to a rest break *and* the pharmacist was prevented from doing so by Walmart. Even under Plaintiffs' theory, a pharmacist who was single staffed for one, two or three hours would have no trouble taking a rest break. Yet, these individuals would be covered by Plaintiffs' proposed class, making it overbroad and unascertainable.

Plaintiffs seem to acknowledge this problem in footnote 6, where they state: "[e]ven for some Pharmacies when Walmart scheduled two Pharmacists," there "was a 3 1/2-4 hour time period when there was only one Pharmacist on duty." (Pls.' Mem. at 3, n.6.) But this statement simply underscores the problem. A pharmacist who was single staffed for "3 1/2" (or even 3 3/4) hours would be covered by the proposed class, and yet should have no trouble taking a break before the fourth hour of work, even under Plaintiffs' theory of the case. Plaintiffs argue that rest breaks cannot be combined with lunch breaks, but lunch breaks do not need to be taken until before the fifth hour of work. Thus, a pharmacist who was single staffed for 3 1/2 hours could take a rest break, return to work, and then take the meal break before the fifth hour. These scheduling issues further underscore the individualized issues that preclude class certification in this case.

B. Plaintiffs' Rest Break Theory Will Not Generate Common Answers that Predominate Over Individualized Issues.

The California Labor Code provides that an employer may not "require an employee to work during any meal or rest periods mandated pursuant to an applicable statute, or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health." Cal. Lab. Code § 226.7(b). As with meal periods, this language only requires employers to make rest breaks available, but does not require employers to ensure that employees actually take their rest breaks. *Cole*, 2016 U.S. Dist. LEXIS 48940, at *5–6 (rejecting the argument that *Brinker* applies only to meal periods).

"[A]n employer is not liable for failure to provide rest breaks if it authorizes and permits an employee to take his or her rest break and the employee—absent coercion or encouragement on the part of the employer—foregoes his or her rest period." *Cleveland*, 2016 U.S. Dist. LEXIS 103672, at *68. Therefore, to establish a rest-break claim, a plaintiff must establish, among other things, that he or she (i) was pressured not to take a rest break; (ii) missed the rest break *as a result* of the pressure; and (iii) Walmart knew about the missed rest break. *Brinker*, 53 Cal. 4th at 1040.

As explained below, Plaintiffs have not shown that these elements can be proven based on common proof that will generate common answers for members of the putative class. *See Dukes*, 564 U.S. at 351 ("What matters to class certification . . . is not the raising of common 'questions'—even in droves— but, rather, the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers.") (internal citation omitted).

1. Plaintiffs Have Not Established A Common Policy Or Practice Discouraging Rest Breaks.

Plaintiffs concede that Walmart's written rest-break policy is lawful and authorizes and permits rest breaks. (Pls.' Mem. 3:3.) Nevertheless, Plaintiffs argue that they were too busy to take rest breaks and also comply with Walmart's security policies and felt it would be beneficial to work through breaks to improve their performance evaluations and increase their bonus compensation. In other words, Plaintiffs claim these other procedures had the practical effect of making it difficult for them to take their breaks.

But this type of theory is not a basis for class certification because these other policies or procedures did not uniformly deprive pharmacists of rest breaks and any analysis of whether these policies or procedures in fact prevented pharmacists from taking rest breaks depends on several variables, including each individual's schedule, productivity, work habits and preferences. *See Wright v. Renzenberger, Inc.*, No. 14-55944, 2016 U.S. App. LEXIS 13340, at *5 (9th Cir. July 21, 2016) ("Renzenberger's policies do not uniformly deprive employees of rest breaks; the effect of the policies depends instead on their interaction with these variables, which differ for each class member. Because these individualized determinations predominate over the common questions, we affirm the denial of certification of the Rest Break Class.")[6]

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[6] *See Roth*, 2013 U.S. Dist. LEXIS 153856, at *17-18; *Hadjavi*, 2011 U.S. Dist. LEXIS 86341, at *10; *Brown v. Fed. Express Corp.*, 249 F.R.D. 580, 586 (C.D. Cal. 2008) (denying certification, even where defendant had consistent employment policies, because the policies' impact on plaintiffs' ability to take breaks depended on individual job duties, work volume, "ebbs and flows in workload," and "expectations of efficiency"); *accord Norris-Wilson v. Delta-T Grp., Inc.*, 270 F.R.D. 596, 609 (S.D. Cal. 2010) (denying rest break certification where putative class members performed "a range of duties, under a range of circumstances"); *Flores v. CVS Pharmacy, Inc.*, No. 2:07-cv-05326-JHN-Ex, 2010 U.S. Dist. LEXIS 118098, at *10, 12-15 (C.D. Cal., Sept. 7, 2010) (denying certification of rest-break claims alleging "corporate culture and store understaffing led to violations"), *aff'd, Flores v. Supervalu, Inc.*, 509 F. App'x 593, 594 (9th Cir. 2013) (unpublished);*Kenny v. Supercuts, Inc.*, 252 F.R.D. 641, 646 (N.D. Cal. 2008) (denying rest-break certification where plaintiff's theory that stores were too busy to "give employees a meaningful opportunity to take breaks" required an individual

a. Goals and Evaluations

As an initial matter, and contrary to Plaintiffs' contention, Walmart does not have a policy or requirement that in-store prescriptions be filled within 20 minutes. (*See* Pls.' Ex. 36, Chung Dep. 116:11-117:3; Def. Ex. 30, Patel Dep. 121:19-122:2.) At most, some Market Directors and Regional Directors have identified that timing as a goal, but failing to meet such a goal carries no negative consequences and appears nowhere on the pharmacists' evaluations. (Pls.' Ex. 36, Chung Dep., 116:11-117:3; Def. Ex. 1, 2 (evaluations); Def. Ex. 30, Patel Dep. 51:10-51:18; Def. Ex. 26, Bhatt Dep. 66:23-67:14, 108:22-109:8; *see also* Herrington Decl. Chart at pp. 15-16.)

In any event, performance goals and annual evaluations cannot be considered unlawful or discouraging of rest breaks, let alone on a class-wide basis. *Braun v. Safeco Ins. Co. of Am.*, No. CV 13-00607 BRO (PLAx), 2014 U.S. Dist. LEXIS 184123, at *41-44 (C.D. Cal., Nov. 7, 2014) (employee skipping a break "to avoid feeling inadequate does not establish Defendants prevented her from taking meal or rest breaks"). Every for-profit company has to have a way to measure employee performance and encourage them to perform better. (*See* Def. Ex. 42, Marshall Dep. 99:23-100:5.) Walmart's use of sales numbers and customer-service scores in evaluations (which do not reference rest breaks or metrics regarding prescription fill times) are designed for such purposes and are not intended to preclude or discourage breaks in any way. (Def. Exs. 1-2.)

No Walmart policy requires or encourages pharmacists not to take their rest breaks, let alone instructs them to violate the law in order to improve their evaluations or meet sales goals. (*See, e.g.*, Def. Ex. 26, Bhatt Dep. 59:7-25.) And, to the extent Plaintiffs claim they would suffer negative consequences for failing to meet such goals, those claims are speculative and inherently subjective. (Pls.' Ex. 36, Chung Dep. 116:11-

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inquiry into each store, shift, and employee); *Basco v. Wal-Mart Stores, Inc.*, 216 F. Supp. 2d 592, 602-04 (E.D. La. 2002) (denying certification of rest-break class due to variations between stores and individualized "reasons why any employee may have missed a meal or work break").

117:3; Def. Ex. 30, Patel Dep. 121:19-122:2.) Thus, any pharmacist's decision to waive a rest break to get more done or improve his/her customers' experience is exactly that—a voluntary, unilateral ***choice*** that cannot support a claim for missed rest breaks. (*See, e.g.*, Def. Ex. 47, Popat Dep. 29:3-30:10, 42:15-44:6) (chose not to follow written rest-break policy, in part, because he wanted larger bonus, which he received every year); *Brinker*, 53 Cal. 4th at 1040 (stating that an employee cannot use employer's flexibility to generate liability); *see also Braun*, 2014 U.S. Dist. LEXIS 184123, at *41-44 ("That [Declarant] sometimes skipped lunch to avoid feeling inadequate does not establish Defendants prevented her from taking meals or rest breaks.").

b. Security Policies

Plaintiffs' reference to Walmart's security policies is equally unavailing. Plaintiffs complain that a section of the Wal-Mart Pharmacy Operations Manual ("POM") makes it difficult or "impracticable" for pharmacists to take rest breaks. (*See* Nikmanesh Decl. ¶ 6.) Specifically, they refer to POM 902 ("Asset Protection Pharmacy Security"), which requires that, "[w]henever there is not a pharmacist present in the pharmacy, it must be secured"—*i.e.*, whenever the pharmacist leaves the pharmacy, he/she must vacate all other associates, close and lock the doors and windows, and set the alarm. (Pls.' Ex. 33.) Of course, the intent of POM 902 is not to discourage rest breaks in any way but rather to ensure the security of thousands of dollars of potentially harmful drugs and various controlled substances. (*See, e.g.*, Pls.' Ex. 41, 61:19-62:3; Def. Ex. 42, Marshall Dep. 79:7-79:14.)

The policy reflected in POM 902 is required by almost all states' pharmacy laws (and is consistent with California law). *See, e.g.*, Cal. Bus. & Prof. Code § 4115(g); Cal. Code Regs., tit. 16, § 1714.1(a). Unlike some states, California includes an exemption from the requirement that a pharmacy not be left unattended where a pharmacist is taking a legally-permitted rest or meal break. Cal. Code Regs., tit. 16, § 1714.1(a). That exemption allows a single-coverage pharmacist to leave the pharmacy without closing it ***only if*** "the pharmacist reasonably believes that the security of the dangerous drugs and devices will be maintained in his or her absence." *Id.* Plaintiffs rely on this exemption (Pls.' Mem. at 4:10-15), but it actually undercuts their position regarding "in pharmacy" breaks. If, as Plaintiffs argue, a pharmacist can leave the pharmacy to take a rest break under California law "by leaving a pharmacy technician in charge," surely they can take a break inside the pharmacy while doing the same.

One of the named Plaintiffs claims that it makes "no sense to shut down the pharmacy for almost 35 minutes to take a 10-minute rest break" (Nikmanesh Decl. ¶ 5(a)), but that assertion simply underscores the individualized nature of these issues. Any analysis of what "makes sense" to an individual pharmacist is subjective and other pharmacists testified that the time it took to close a pharmacy varies. (*See* Def. Ex. 41, Leiva Dep. 37:9-49:15 (*e.g.*, claiming that pushing two buttons to close two gates took two minutes, and failing to provide estimates for other tasks: "I really couldn't tell you because, again, it varied").)[7] Other witnesses have testified that it took only 30 seconds to a few minutes to close a pharmacy. (*See, e.g.*, Def. Ex. 30, Patel Dep. 85:18-86:13; Def. Ex. 27, Chung Dep. 89:21-90:14; Def. Ex. 28, Crawford Dep. 120:18-121:12, 159:11-159:25.)

Moreover, regardless of the time it takes, many pharmacists in California do, in fact, close down their pharmacies to take breaks. (*See, e.g.*, Def. Ex. 17, Sherman Decl. ¶ 9; Def. Ex. 5, Do Decl. ¶ 9.) Many other pharmacists, meanwhile, prefer to take breaks in their pharmacies, and still others decide not to take the authorized and permitted breaks at any given time and for a multitude of personal reasons, thus mooting the need to shut down the pharmacy under POM 902. (*See, e.g.*, Def. Ex. 8, Johnson Decl. ¶ 9; Def. Ex. 19,Wong Decl. ¶ 6.) Thus, any argument that POM 902 commonly discourages all pharmacists from taking breaks at all times is incorrect, and the policy's purported effect on a particular pharmacist on a particular day would need to be assessed on an individualized, shift-by-shift basis, which is incompatible with class treatment. *Brown*, 249 F.R.D. at 586 (C.D. Cal. 2008) (impact of policies on plaintiffs' ability to take breaks depended on individualized inquiries); *accord Norris-Wilson*, 270 F.R.D. at 609.

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[7] Plaintiffs' own declarations reveal that the time necessary to shut down the pharmacy varies substantially—from 5 minutes to 20 minutes. (*Compare, e.g.*, Pls.' Exs. 1, Astor Decl. ¶ 10 (closing pharmacy takes as little as five minutes); *with, e.g.*, Ex. 32, Leiva Decl. ¶ 4(a) (claiming as much as 20 minutes); *see also* Ex. 30. Richie Tuan Le Decl. ¶ 4(a) (failing to identify time needed to close pharmacy).)

c. Location of Breaks

Plaintiffs claim that Walmart required pharmacists to remain in their pharmacies during breaks as a result of POM 902, but that is incorrect. In support of this claim, Plaintiffs point to an e-mail from Market Director Craig Crawford; an e-mail from then Divisional Director Warren Moore; and deposition testimony from Regional Director Anthony Chung. (Pls.' Mem., n.11.) Plaintiffs, however, have misstated these communications.

For example, Mr. Crawford's email was sent only to Pharmacy Managers in his Market and did not constitute a policy of any sort. (Def. Ex. 28, Crawford Dep. 121:14-121:19, 124:11-125:17.) Nor did the e-mail mandate that breaks be taken inside the pharmacy. Rather, it suggested that pharmacists should not close down their pharmacies for 15-minute breaks but rather "[s]tay open [and] take the break in the pharmacy, ***if needed***." (Pls.' Ex. 9 (emphasis added).) This is unhelpful to Plaintiffs for four reasons:

- First, the e-mail expressly says "if needed," indicating that Mr. Crawford was not recommending in-pharmacy breaks at all times, but rather in circumstances where the pharmacist found it warranted. (Pls.' Ex. 9.)
- Second, this single e-mail from a single Market Director with responsibility for nine of the approximately 300 California pharmacies cannot be considered a common or uniform policy; instead, it highlights the individualized inquiry that must be undertaken with respect to these claims. (*Compare id.*; with Pls.' Ex. 42; Def. Ex. 28, Crawford Dep. 121:14-121:19, 124:11-125:17.)
- Third, there is no evidence that pharmacists in Mr. Crawford's market began taking breaks inside the pharmacy after his e-mail, particularly given other conversations explaining that breaks could be taken outside the pharmacy.

(Def. Ex. 28, Crawford Dep. 116:12-117:15; 124:15-126:2, 126:12-127:18, 128:4-128:21; 130:6-132:22.)

- Fourth, the e-mail itself, along with Mr. Crawford's deposition testimony, reflects that *pharmacists were, in fact, taking rest breaks* by closing down their pharmacies prior to his sending the e-mail in May 2015—six months after this case was filed. (Pls.' Ex. 9; Def. Ex. 28, Crawford Dep. 120:12-121:3.)

Likewise, Plaintiffs have taken out of context the October 2012 e-mail from Warren Moore (Pls.' Ex. 10.), in which Mr. Moore explains that "[Walmart pharmacies in California] have made a consistent effort to minimize the number of times (if any) we close the pharmacy throughout the day." (*Id.*) But the next two sentences of the e-mail, the prior e-mail in the string, and Mr. Moore's deposition testimony all make clear that the "effort" to which he was referring ***was not*** an effort to discourage pharmacists from taking breaks. (*Id.*; Def. Ex. 29, Moore Dep. 117:14-119:15.) Exactly the opposite is true: the effort was to provide increased staffing and better scheduling to create more double- or triple-coverage situations (*i.e.*, more overlap between pharmacists' schedules) for the purpose of *encouraging* pharmacists to take breaks and provide better patient care. (*Id.*) Thus, the primary document on which Plaintiffs rely to demonstrate a supposed "common policy" of discouraging rest breaks refutes their argument.

Finally, Plaintiffs' citation to Mr. Chung's deposition testimony is unavailing as the cited testimony, which never even mentions closing the pharmacy, reveals that, contrary to Plaintiffs' assertions: (i) Walmart did not have a policy requiring in-store prescriptions to be filled within 20 minutes; (ii) the ability of any given pharmacist to take rest breaks while also filling in-store prescriptions within 20 minutes would depend on the pharmacist and the situation; and (iii) a failure to fill in-store prescriptions within 20 minutes would not result in any negative consequences. (Pls.' Ex. 36, Chung Dep.

116:11-118:23.) Thus, the evidence cited by Plaintiffs yet again says the exact opposite of the proposition for which it is cited.[8]

In sum, Plaintiffs have not identified any common policy that could have discouraged them from taking rest breaks, let alone on a class-wide basis.

2. Plaintiffs Have Not Established That They Missed Rest Breaks *Because Of* Any Common Policy.

Plaintiffs have submitted their own declarations and those of 62 other pharmacists. (*See* Pls.' Compendium of Class Member Declarations ("Pls.' Dec. Comp.").) According to their own declarations, two of those other 62 pharmacists did, in fact, take rest breaks, even while on a single-coverage shifts. (T. Nguyen Decl. ¶ 7; V. Nguyen Decl. ¶ 7.) The other 60 putative class members and the four named Plaintiffs claim that they essentially never took rest breaks while on single- coverage shifts. (*See generally* Pls.' Dec. Comp.)

But few, if any, of these pharmacists who claim to have been so busy every single shift that they never had time to take even a single break, ever appear to have complained or said anything to anyone at Walmart about their inability to take breaks. (*See, e.g.,* Herrington Decl., Chart at p. 14-15.) And, none of Plaintiffs' evidence says anything about whether any *other* putative class members ever missed any rest breaks at all, let alone the reason for any such missed breaks or whether Walmart knew about them. *See Dudley v. Brookdale Senior Living Cmtys., Inc.*, No. CV 14-2184 PSG (VBKx), 2015 U.S. Dist. LEXIS 181036, at *19 (C.D. Cal. Mar. 24, 2015) ("Plaintiffs have not even attempted to demonstrate to the Court that their evidence is representative of all the communities where putative class members are/were employed . . . . thereby preventing the Court from adequately analyzing how representative their ten declarants are vis-à-vis the rest of the putative class.") Some (but not all) of the Plaintiffs' declarants claim that they never saw any other pharmacists taking a rest break (*see, e.g.*, Chan Decl. ¶ 7), but given plaintiffs own theory which is limited breaks during single-coverage shifts—i.e.,

[8] Furthermore, the questions in the cited excerpt were objectionable for the reasons stated on the record. (Pls.' Ex. 36, 116:11-118:23.)

when no other pharmacists were around—other pharmacists would not have seen such breaks.

Further, using cookie-cutter declarations from 62 of the approximately 1,300 pharmacists across California, it is no more reasonable to infer that other putative class members "missed" rest breaks (via voluntary waiver or otherwise) than it is to infer that they took rest breaks. *See Gonzalez v. OfficeMax N. Am.*, Nos. SA CV 07-00452 JVS (MLGx); CV 07-04839 JVS (MLGx), 2012 U.S. Dist. LEXIS 163853, at *11 (C.D. Cal., Nov. 5, 2012) (denying certification where plaintiffs failed to provide "classwide evidence that precludes the possibility that some employees took rest breaks, and some employees voluntarily declined to take their rest breaks, at least some of the time" and defendant presented evidence of such breaks).

Dr. Cohen has likewise offered no class-wide evidence of any missed breaks, let alone the reason for such missed breaks or Walmart's knowledge of them. *Compare generally* (Cohen Decl.), *with Dailey v. Sears, Roebuck & Co.*, 214 Cal. App. 4th 974, 1000-01 (2013) (lack of evidence of policy or routine practice to deprive employees of "off duty" rest breaks precludes certification), *and Ordonez v. Radio Shack, Inc.*, No. CV 10-7060-CAS (JCGx), 2013 U.S. Dist. LEXIS 7868, at *22-23 (C.D. Cal. Jan. 17, 2013) (finding that "in the absence of a uniform [unlawful] corporate policy, there is no common issue capable of resolution on a class wide basis" because it is too difficult to determine on class-wide basis if missed breaks were the result of violations, were voluntary, or occurred at all). Instead, after acknowledging that direct evidence of allegedly missed breaks does not exist, he merely claims that he ***could*** come up with analyses of punch-clock and alarm records to determine when pharmacists were on single-coverage, the length of those shifts, and whether their respective pharmacies were closed during those shifts. (*See generally* Cohen Decl.) He also claims that he ***could*** conduct a survey of pharmacists to determine an average number of missed breaks and the purported reasons. (*Id.*)

Of course, such speculation from an expert is not evidence, and it is insufficient to support any inference. *Duran v. U.S. Bank Nat'l Ass'n*, 59 Cal. 4th 1, 31-32 (2014) ("While sampling may furnish indications of an employer's centralized practices, no court has 'deemed a mere proposal for statistical sampling to be an adequate evidentiary *substitute* for demonstrating the requisite commonality, or suggested that statistical sampling may be used to manufacture predominate common issues where the factual record indicates none exist.'") (internal citations omitted); *Morgan*, 210 Cal. App. 4th at 1369 ("It is not sufficient … simply to mention a procedural tool; the party seeking class certification must explain how the procedure will effectively manage the issues in question.") (internal quotation marks and citation omitted); *Dailey*, 214 Cal. App. 4th at 998 ("We have found no case … where a court has deemed a mere proposal for statistical sampling to be an adequate evidentiary *substitute* for demonstrating the requisite commonality, or suggested that statistical sampling may be used to manufacture predominate common issues where the factual record indicates none exist."). This is particularly true given that Dr. Cohen provides no explanation for his failure to design or conduct his proposed survey and analyses, despite the fact that Plaintiffs' counsel have long had the data he says that he would need. (Herrington Decl. ¶¶ 2-4.)[9]

Moreover, the cases Plaintiffs cite regarding commonality under Rule 23(a) are all inapposite. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019-1020 (9th Cir. 1998), merely sets forth the Ninth Circuit's pre-*Dukes* standard for commonality on motions to approve class settlement (which says nothing about certification of rest-break claims in the

[9] In any event, any such survey or analysis would be meaningless as they could not show whether a pharmacist chose, for example, to take a break inside the pharmacy or to waive a rest break entirely. *See Brinker*, 53 Cal. 4th at 1040; *Lou v. Ma Labs., Inc.*, No. C 12-05409 WHA, 2014 U.S. Dist. LEXIS 2665, at *10-11 (N.D. Cal., Jan. 8, 2014) (proposed analysis of time-clock and phone records cannot support certification of "off-the-clock" claims because it cannot provide class-wide evidence that calls to/from work phones constituted work). As noted earlier, concurrently with this Opposition, Walmart is filing objections to Dr. Cohen's declaration.

context at issue here). *Augustus v. ABM Sec. Servs., Inc.*, 233 Cal. App. 4th 1065 (2014) (review pending), is unhelpful to Plaintiffs as the defendant in that case *conceded* that it maintained a uniform policy requiring all security-guard employees to remain "on call" during rest breaks. *Augustus*, 233 Cal. App. 4th at 1076-77. Nothing could be further from this case. Instead, the evidence here establishes that Walmart's policy authorized and permitted rest breaks, pharmacists understood that policy, and they made voluntary, independent, and individualized choices about whether, when and how to take their breaks.[10] (*See, e.g.*, Def. Ex. 9, Le Decl. ¶¶ 2, 4-7, 9, Def. Ex. 19; Wong Decl. ¶¶ 2, 4-6, 8-9, 11, Def. Ex. 41; Leiva Dep. 24:1-12, 25:1-29:8); Def. Ex. 43, Nemenzo Dep. 25:5-13, 30:5-10, 32:19-33:9 ("It's up to them"); Def. Ex. 45, V. Nguyen Dep. 21:19-21, 28:15-23, 55:17-25, 72:10-73:14; Def. Ex. 22, A. Nguyen II Dep. 25:14-26:7, 37:4-11, 87:19-88:24.; *see also generally* Herrington Decl., Chart). Even if Walmart had required pharmacists to remain on call during breaks (which it has not), the court in *Augustus* determined that such a practice was *lawful*. *Augustus*, 233 Cal. App. 4th at 1076-77.

3. Plaintiffs Have Not Established That Walmart Was Aware Of Allegedly Denied Rest Breaks.

As explained above, Dr. Cohen offers no basis on which to conclude that Walmart was aware of any allegedly missed rest breaks, and Plaintiffs' declarations are equally silent in this regard. (*See generally* Pls.' Dec. Comp.) Deposition testimony, however, reveals that few, if any, pharmacists ever complained to their supervisors about any issues even tangentially related to rest breaks, and, when they did, they were addressed immediately. (*See, e.g.*, Def. Ex. 37, J. Chau Dep. 27:12-29:2.) Furthermore, unlike many other employment practices that have to be recorded by the employer, rest breaks are specifically excluded from that requirement, Cal. Code Regs., tit. 8, § 11070, subs.

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[10] Walmart's written policy states plainly that employees "***must not perform any work during [their] rest breaks***," encourages them to take breaks "in the facility's break/meeting room," and provides for a subsequent break if an initial break is interrupted. (Pls.' Ex. 42.)

7(A)(3), and Walmart does not keep any such records (*see* Pls.' Ex. 42). Thus, Plaintiffs have not established that Walmart knew about any allegedly missed rest breaks, let alone on a class-wide basis, and they cannot shift the burden of discovering such allegations to Walmart. *See White v. Starbucks Corp.*, 497 F. Supp. 2d 1080, 1083 (N.D. Cal. 2007) (plaintiff must prove that employer "had actual or constructive knowledge" of alleged violations or unpaid hours).

C. The Named Plaintiffs Are Not Typical Under Rule 23(a)(3)

Rule 23(a)(3)'s typicality requirement "assure[s] that the interests of the named representative align with the interests of the class." *Nitsch v. Dreamworks Animation SKG Inc.*, No. 14-CV-04062-LHK, 2016 U.S. Dist. LEXIS 69397, at *36-37 (N.D. Cal., May 25, 2016) (citing *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 984-85 (9th Cir. 2011)). "[A] named plaintiff's motion for class certification should not be granted if 'there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it.'" *Ellis*, 657 F.3d at 984 (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)) (vacating certification and remanding for analysis of unique defenses); *see also Kandel v. Brother Int'l Corp.*, 264 F.R.D. 630, 632-34 (C.D. Cal. 2010) (denying certification where plaintiffs were "susceptible to individual defenses that threaten to detract seriously from the presentation of the class's case and become a central focus of the litigation," including "questions related to [the named plaintiffs'] credibility").

Here, the claims of the named Plaintiffs are not typical of the other putative class members. As explained above, the named Plaintiffs were Pharmacy Managers for much of the relevant period. (*See* Section II(A), *supra.*) Thus, they cannot assert claims based on understaffing or inappropriate scheduling that precluded them from taking rest breaks because ***they were responsible*** for such staffing and scheduling. (*See, e.g.*, Def. Exs. 37, J. Chau Dep. 16:18-17:7; Ex. 49, Wong Dep. 17:12-15, 18:21-23.) Likewise, they cannot assert claims for alleged failures to follow company policies because they were the ones responsible for ensuring compliance with those policies, including the rest-break policy, and fielding any HR complaints. (*See, e.g.*, Def. Exs. 47, Popat Dep. 20:4-8, 21:8-18; Ex. 49, Wong Dep. 18:2-8; Ex. 43, Nemenzo Dep. 29:14-30:14.)

Walmart also has unique defenses relating to the named Plaintiffs' rest-break practices and their credibility. Plaintiff Nikmanesh, for example, made numerous complaints to Walmart about her employment conditions (none of which had merit), but *never once* complained about understaffing or an inability to take her rest breaks (let alone the purported inability of her Staff Pharmacists to take rest breaks). (Def. Ex. 22, Nikmanesh Dep. II 293:4-8.)

D. The Named Plaintiffs Are Not Adequate Under Rule 23(a)(4)

Under Rule 23(a)(4), "[i]t is axiomatic that a putative representative cannot adequately protect the class if the representative's interests are antagonistic to or in conflict with the objectives of those being represented." Wright, Miller, & Kane, *7A Fed. Prac. & Proc. Civ.* § 1768 (3d ed.). Thus, where there are significant accusations of wrongful conduct by and between class members, the required adequacy is lacking, and certification should be denied. *See Moore v. Napolitano*, 269 F.R.D. 21, 34-35 (D.D.C. 2010) (denying certification where class definition included putative members who had been directly accused of the very discrimination at issue in the litigation); *see also Sandoval v. Ali*, 34 F. Supp. 3d 1031, 1048 (N.D. Cal. 2014) (it is plaintiffs' burden on motion for class certification to establish that no conflict exists).

Here, as Pharmacy Managers, the named Plaintiffs cannot adequately represent the interests of class members who were Staff Pharmacists, as those Staff Pharmacists must assert that their Pharmacy Managers enforced policies that precluded them from taking breaks and were aware of missed breaks. *See Hadjavi*, 2011 U.S. Dist. LEXIS 86341, at *17 ("This raises conflict of interest concerns in that Plaintiff Hoang's supervisor, Plaintiff Harris, a named Plaintiff in this action, may have contributed to Plaintiff Hoang's inability to take his meal breaks."); *Davis v. Kraft Foods N. Am.*, No. 03-6060, 2006 U.S. Dist. LEXIS 3512, at *30-38 (E.D. Pa., Jan. 31, 2006) (class representatives inadequate where counsel sought to represent both (i) a supervisor who was responsible for disciplining employees and (ii) employees who claimed disproportionate discipline of black employees).

Putative class members have testified in deposition that their respective Pharmacy Managers discouraged them from taking breaks by improperly staffing or scheduling their respective pharmacies, asking them to do more work, and/or asking them to improve their prescription fill times or customer-service scores. (*See, e.g.*, Def. Ex. 41, Leiva Dep. 57:18-59:13.) Some have also claimed that they were unaware of the written rest-break policy and/or complained to their Pharmacy Managers about missing their rest breaks. (*See, e.g.*, Def. Ex. 50, Yee Dep. 34:15-36:20.) The Pharmacy Managers, on the other hand, have testified in deposition that they communicated the rest-break policy to their Staff Pharmacists, that they never told anyone not to take a rest break or discouraged rest breaks, and that nobody ever complained to them about rest breaks. (*See, e.g.*, Def. Ex. 45, V. Nguyen Dep. 25:5-10, 48:15-49:11; Def. Ex. 47, Popat Dep. 30:16-18, 31:5-11.)

In short, this conflict is not speculative; it is extant and concrete. The named Plaintiffs and other Pharmacy Managers have already testified and must continue to testify against Staff Pharmacists and *vice versa*, such that members of the putative class have an intractable conflict. In turn, the named Plaintiffs cannot adequately represent the entire class, nor can their counsel represent both groups of putative class members, as counsel would be aware that at least one group would be testifying falsely against the other (unless Plaintiffs contend that not all group members had similar practices or experiences, which would contradict and undermine their claims of commonality and predominance). *See Baas v. Dollar Tree Stores, Inc.*, No. C 07-03108 JSW, 2008 U.S. Dist. LEXIS 119908, at *5-10 (N.D. Cal., Apr. 1, 2008) (denying certification where plaintiffs' counsel sought to represent staff employees and supervisor who testified that he never asked anyone to work off the clock: "To reconcile the testimony of [the supervisor] and [the staff employees], Plaintiffs' counsel will either need to portray [the supervisor] as a liar or as a manager who knowingly violated his company's policies.");

see also Kayes v. Pac. Lumber Co., 51 F.3d 1449, 1465 (9th Cir. 1995) (Class counsel's responsibility "to absent class members whose control over their attorneys is limited does not permit even the appearance of divided loyalties of counsel.")(internal citation omitted).

E. Common Questions Do Not Predominate, And A Class Action Is Not Superior Under Rule 23(b)(3)

Plaintiffs have failed to establish under Rule 23(b)(3) that common issues predominate over individualized issues, such as when, where, and why breaks were allegedly missed, and whether Walmart knew about them. To the contrary, Plaintiffs' own evidence and testimony reveal that pharmacists were aware of Walmart's rest-break policies, understood they were entitled to take rest breaks, and it was simply their choice to at times forego breaks, either because they felt they were too busy to close down the pharmacy or because they wanted to increase sales or improve customers' experiences.

Thus, Plaintiffs cannot show, as they must, that such reasons and choices were common to all Walmart pharmacists across California every day over the past five years. *See Kenny*, 252 F.R.D. at 646; *Flores*, 2010 U.S. Dist. LEXIS 118098, at *10, 12-15; *Morgan*, 210 Cal. App. 4th at 1362. It strains credulity to think that every Walmart pharmacy in California is always so busy that it is never feasible to shut down for brief periods in order to take breaks, and, as Plaintiffs have again admitted, there is substantial variation in sales volume, staffing and scheduling) from store to store, day to day, and even shift to shift. (*See, e.g.*, Def. Ex. 23, Atencio Dep. 141:5-20, 142:5-14; Def. Ex. 43, Nemenzo Dep. 48:16-49:21, 52:17-53:8, 54:4-18; Def. Ex. 21, Nikmanesh II Dep. 175:9-24; Def. Ex. 35, Chan Dep. 86:11-25.); *see Brown*, 249 F.R.D. at 586; *accord Norris-Wilson*, 270 F.R.D. at 609; *see also Basco*, 216 F. Supp. 2d at 602-04; *Brown v. Wal-Mart Stores, Inc.*, No. C 08-5221 SI, 2013 U.S. Dist. LEXIS 55930, at *12-15 (N.D. Cal. Apr. 18, 2013) (dismissing break claims where Plaintiffs alleged Walmart "pressured, incentivized, and discouraged" them from taking breaks and that the scheduling policy made it "difficult" to take breaks, without averring facts to show consistent practice).

As the evidence shows, many pharmacists do shut down their pharmacies to take breaks, while others sometimes choose to take breaks inside the pharmacy or to waive their break entirely. (*See, e.g.*, Def. Ex. 9, Le Decl. ¶¶ 4, 6; Def. Ex. 19, Wong Decl. ¶¶ 4-6, 9, 11; Def. Ex. 22, A. Nguyen II Dep. 37:4-11; Def. Ex. 45, V. Nguyen Dep. 30:20-31:2, 72:10-73:4; Def. Ex. 49, Wong Dep. 25:17-26:9); *see Burnell v. Swift Transp. Co. of Ariz., LLC*, No. EDCV 10-809-VAD (SPx), 2016 WL 2621616, at *4-5 (denying certification because, among other things, evidence showed that some employees took breaks without interference, such that it could not have been uniformly too difficult to take breaks); *Gonzalez*, 2012 U.S. Dist. LEXIS 163853, at *11 (same); *see also Clemens v. Hair Club for Men, LLC*, No. C 15-01431 WHA, 2016 U.S. Dist. LEXIS 50573, at *15-16 (N.D. Cal., Apr. 14, 2016) (denying certification because, among other things, plaintiffs sometimes took breaks); *Campbell v. Best Buy Stores, L.P.*, No. LA CV12-07794 JAK (SHx), 2013 U.S. Dist. LEXIS 137792, at *34 (C.D. Cal., Sept. 20, 2013) ("[E]ven if some [employees] experienced pressure from . . . supervisors to miss breaks . . . , some [employees] did not. As a result, resolving . . . whether [employees] missed breaks . . . , as well as the reasons why any particular [employee] did so, will necessarily involve individualized inquiries.").

Thus, individual issues predominate over any purportedly common issues regarding allegedly "missed" breaks, and a class action is not manageable, let alone superior to other methods of adjudication. *See Koval v. Pac. Bell Tel. Co.*, 232 Cal. App. 4th 1050, 1063 (2014) (affirming denial of certification on manageability grounds); *Morgan*, 210 Cal. App. 4th at 1362, 1369.

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' motion for class certification in its entirety.

DATED: November 7, 2016

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